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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 136

CHARLIE SOPER AND JACK MEASE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14-20; R. 142-147) is reported at 220 F. 2d 158.

JURISDICTION

The judgment of the Court of Appeals was rendered on March 8, 1955 (Pet. 20-21; R. 148) and a petition for rehearing was denied on May 10, 1955 (Pet. 21; R. 149). The petition for a writ of certiorari was filed on June 9, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether suppression as evidence of a gun seized as a result of an illegal search prevents the admission of testimony relative to the use of the gun in the commission of the charged offense.

2. Whether the court committed reversible error when it instructed the jury to disregard the designation "M-1" in an indictment which charged assault with a dangerous weapon, "to wit, a loaded automatic M-1 rifle."

3. Whether the trial court properly denied petitioners' motion to dismiss the indictment.

STATUTE INVOLVED

The pertinent statute provides in part:

> Section 65-4-22, Alaska Compiled Laws Ann. (1949):
>
> Assault with dangerous weapon. That whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the county jail not more than one year nor less than one month, or by fine not less than one hundred dollars nor more than one thousand dollars.

STATEMENT

A two-count indictment filed in the United States District Court for the District of Alaska charged that petitioners being "armed with a dangerous weapon, to wit, a loaded automatic M-1 rifle, feloniously assaulted" Sylvester Johnson (count 1) and

Mildred Young (count 2) in violation of 65-4-22 Alaska Compiled Laws Ann. (1949) (R. 3-4). Following a jury trial they were found guilty on both counts (R. 32) and sentenced to concurrent terms of imprisonment for eighteen months (R. 36-37). On appeal, the judgment of conviction was affirmed (Pet. 20-21; R. 148).

Petitioners' pretrial motion to suppress as evidence an automatic M-2 carbine which was allegedly taken from petitioner Mease was granted on the ground that the warrant and the underlying affidavit covered the seizure of an "M-1 rifle" from petitioner Soper and not the automatic M-2 carbine which was taken from petitioner Mease (R. 5-8, 19, 62).

The evidence showed that on October 4, 1953, while Sylvester Johnson was visiting Mildred Young, a widow of about two weeks, petitioners came in and tried to get the two to go out with them (R. 64-66, 79-80, 84, 103, 117). When Mrs. Young and Johnson refused, Mease went to his car and returned with an automatic rifle (R. 66-67, 70, 81). Mease drew the gun on Johnson and both men beat him (R. 67-71, 81, 105-107). At the point of the gun, then held by Soper, petitioners forced the other two out of the house (R. 70, 82). Outside, when Mrs. Young started to scream, petitioner Soper hit her and either pointed the gun at her or tried to hit her with it, but she deflected its direction (R. 83). Mease took the gun away from Soper and tried to shoot Johnson who had broken away and run down the street (R. 83).

ARGUMENT

1. When Mr. Johnson and Mrs. Young testified to the fact that petitioners threatened them with a rifle, petitioners' counsel unsuccessfully objected to the admission of such testimony unless the weapon was presented in evidence (R. 67, 82). Petitioners now complain (Pet. 5) that the admission of such evidence violated the order of suppression. The short answer is that the exclusionary rule relates to the use of evidence obtained as a result of the search and seizure. Obviously, the testimony of Mrs. Young and Mr. Johnson relating to the gun was not in any way the result of the later search and seizure. See *Zap* v. *United States,* 328 U. S. 624, 629; *United States* v. *Lee,* 274 U. S. 559, 563.

2. Over petitioners' objection (R. 134-135), the court instructed the jury as follows (R. 22):

> The jury is further instructed that pursuant to the laws in force in Alaska, the words and figures "M-1" in Counts I and II of said Indictment have been eliminated and you, the jury, should consider said Counts I and II as if they had never contained the said words and figures "M-1."

Petitioners attack (Pet. 8) this instruction as an amendment of the indictment without a resubmission to the grand jury—a practice condemned by this Court in *Ex Parte Bain,* 121 U. S. 1, as to a change in substance. In this case, however, as the court below held (Pet. 18-19), the allegation that

the rifle was an M-1 was surplusage, since a loaded automatic rifle is a dangerous weapon regardless of whether it was or was not an M-1. The jury may properly be instructed to disregard surplus allegations. *Ford* v. *United States,* 273 U. S. 593.

Petitioner relies on cases to the effect that if immaterial averments are in any sense descriptive of the identity of what is essential they cannot be rejected as surplusage (Pet. 7-9). In this case the statute (Section 65-4-22, Alaska Compiled Laws Ann. (1949), under which the indictment was drawn requires only the use of a dangerous weapon. The description of the dangerous weapon as an automatic rifle was a sufficient specification of the nature of the weapon, so that its characterization as an M-1 was immaterial.[1]

3. The motion to suppress was granted on the morning of the first day of the trial (R. 48, 62). During the noon recess, petitioners filed a motion to dismiss the indictment, alleging that it had appeared from the hearing on the motion to suppress that the United States attorney was prejudiced against petitioner Soper at the time the indictment was returned by the grand jury, and that, inasmuch as the suppressed gun had been presented to the grand jury, the indictment was obtained by the use of illegal evidence (R. 19-20). The district

[1] In *Carney* v. *United States,* 163 F. 2d 784 (C.A. 9), relied upon by petitioners (Pet. 12), the descriptive phrase was considered essential to the offense charged. Aside from the fact that it is from the same circuit as the instant case, that decision is therefore not, in principle, in conflict with the decision below.

court summarily denied the motion (R. 63).

Petitioners complain that the court acted too summarily, without giving real consideration to the motion (Pet. 5, 11). It is clear, however, that more extended consideration would have availed petitioners nothing for the motion was insufficient on its face. An indictment will not be dismissed merely because some illegal evidence has formed the basis thereof. *Holt* v. *United States,* 218 U. S. 245. Here, the gun alone, without testimony by the persons assaulted, could not have formed the basis of an indictment. As to the allegation of prejudice by the United States attorney, apparently based on his statement during the motion to suppress that Soper had made an attack upon him (R. 54), there was no attempt to show that such alleged prejudice influenced the grand jury.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1955.

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